

JAMES M. INHOFE, OKLAHOMA, CHAIRMAN

JOHN W. WARNER, VIRGINIA
CHRISTOPHER S. BOND, MISSOURI
GEORGE V. VOINOVICH, OHIO
LINCOLN CHAFEE, RHODE ISLAND
LISA MURKOWSKI, ALASKA
JOHN THUNE, SOUTH DAKOTA
JIM DEMINT, SOUTH CAROLINA
JOHNNY ISAKSON, GEORGIA
DAVID VITTER, LOUISIANA

JAMES M. JEFFORDS, VERMONT
MAX BAUCUS, MONTANA
JOSEPH I. LIEBERMAN, CONNECTICUT
BARBARA BOXER, CALIFORNIA
THOMAS R. CARPER, DELAWARE
HILLARY RODHAM CLINTON, NEW YORK
FRANK LAUTENBERG, NEW JERSEY
BARACK OBAMA, ILLINOIS

ANDREW WHEELER, MAJORITY STAFF DIRECTOR
KEN CONNOLLY, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

March 6, 2006

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Johnson:

We are writing regarding the Environmental Protection Agency's (EPA's) proposed rule, entitled, "Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Stormwater Discharges Associated with Oil and Gas Exploration, Production, Processing, or Treatment Operations, or Transmission Facilities," which was published in the Federal Register on January 6, 2006 (71 FR 894) (EPA Water Docket, ID #OW-2002-0068). This proposed rule purports to implement section 323 of the Energy Policy Act of 2005, which added a new paragraph to section 502 of the Clean Water Act to define the term "oil and gas exploration, production, processing, or treatment, or transmission facilities." Instead of simply implementing this change intended by Congress, the proposed rule incorrectly interprets the 1987 Clean Water Act by excluding sediment contamination as a factor that may cause a normally exempt activity under oil and gas exploration and production to require a stormwater permit. This proposal contradicts the seventeen-year-old NPDES regulations on this subject under the guise of Congressional intent where none exists. The water quality implications of excluding sediment as a permitting factor are significant. Sediment clouds water, decreases photosynthetic activity, reduces the viability of aquatic plants and animals, and can ultimately destroy animals and their habitat.

We strongly disagree with the Agency taking this action under the guise of Congressional intent. The exemption created under Section 323 of the Energy Policy Act of 2005 represents a significant rollback in Clean Water Act protection. The EPA's proposed action would not only implement this exemption, but it would take additional, unjustified steps to roll back even further clean water protections in ways that are inconsistent with the plain language of Section 323. Attached are our specific comments on the proposed rule (Attachment A).

We would like your responses to the following requests:

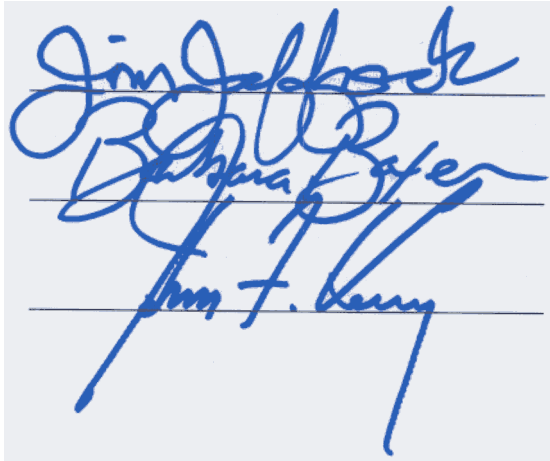
The EPA docket for this rulemaking (EPA-HQ-OW-2002-0068) contains correspondence from Ernest Angelo, a petroleum engineer from Midland, Texas, to Karl Rove, Senior Advisor to the President, and responses to this letter from Karl Rove and Tracy Meehan, Assistant Administrator, Office of Water, EPA (Attachment B). Please explain the impact of this correspondence on the January

6, 2006 proposed rulemaking and the EPA's 2003 and 2005 stormwater permitting rules that postponed NPDES permit regulation for oil and gas construction activities.

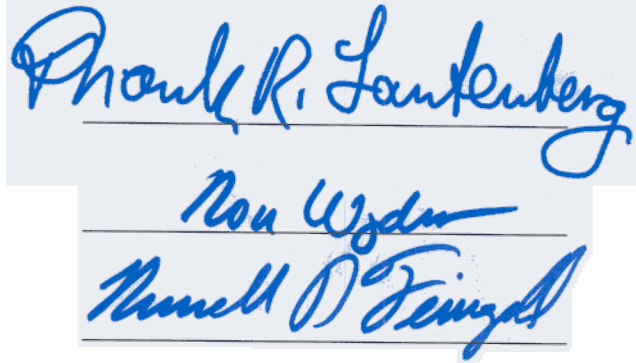
2. The EPA docket for the January 6, 2006 proposed rulemaking also contains comments from the Office of Management and Budget (OMB) indicating that OMB originated the idea to eliminate sediment from the definition of contamination (Attachment C), which EPA has included in this proposed rule. Please explain why the EPA did not originally include this language in its proposal, what justification OMB provided for inserting these changes to the original EPA rulemaking, and what effect this change would have on human health and the environment.
3. EPA's proposal provides new clarification that a water quality standard violation for sediment alone, under 40 CFR section 122.26(a)(2)(ii), does not trigger a permitting requirement. EPA offers no other justification for this action than its "belief" regarding Congressional intent. As explained in Attachment A, there is nothing in the legislative history which suggests that this change regarding sediment had even entered the mind of any member of Congress as it considered the Energy Policy Act of 2005, and there is ample legislative history to demonstrate that this proposal is contrary to the express intent of Congress when it enacted section 402(l)(2) of the Clean Water Act in 1987. Please specify your rationale for this new interpretation and explain how it is consistent with the legislative history of the Clean Water Act and the intent of Congress in enacting the Energy Policy Act of 2005.
4. EPA's proposal implies that a water quality standard violation due to sediment is somehow not as serious as a water quality standard violation due to some other pollutant. Please explain how this action is consistent with section 303(c) of the Clean Water Act, which establishes the beneficial uses that must be taken into account when establishing water quality standards.
5. We are aware that EPA's own studies show that sediment is one of the leading causes of water pollution across the nation. For example, in 1998 EPA reported, "siltation is the largest cause of impaired water quality in rivers," (National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68728 (Dec. 8, 1999)). Additionally, EPA identified numerous ways in which sediment interferes with designated and existing uses of the nation's waters in its protocol for developing sediment TMDLs (EPA U.S. EPA Protocol for Developing Sediment TMDLs, Washington, DC 1999, available at www.epa.gov/owow/tmdl/sediments/pdf/sediment.pdf.) Please explain why the EPA is taking an action regarding sediment in this proposal that is inconsistent with the findings of these studies.

We urge the EPA to drop its proposed modifications to section 122.26 dealing with discharges of sediment from its rulemaking and limit any action the Agency takes to the statutory requirements of the Energy Policy Act of 2005. Thank you for your consideration and reply.

Sincerely,



Handwritten signatures of Jim Jeffords, Barbara Boxer, and Tim W. Kenny.



Handwritten signatures of Frank R. Lautenberg, Ron Wyden, and Russell D. Feingold.